Flindt had acquired control of the majority of the bank stock. The position of the surety is changed from that of surety for two officers in the discharge of their duties to the bank to that of surety for the acts of those in direct control of the bank and owning a majority of its stock. Such a change in its duties can scarcely be considered as included in the clause allowing a "change of position" of an "employee" within the bank. In a similar situation where the person bonded alone obtained a majority of the stock, this same court has held that the surety was discharged. *Farmer's and Merchant's Bank v. United States Fidelity Co.* (1911) 28 S. D. 315, 133 N. W. 247. Where there is a specific guaranty of a specific contract, any change, though not material, in the contract releases the surety. *Page v. Krekey* (1893) 137 N. Y. 307, 33 N. E. 311; *Evans v. Graden* (1894) 125 Mo. 72, 28 S. W. 439. If the contract of guaranty is general, covering the performance of a number of duties to the obligee, as in the instant case, the usual rule is that a material change in those duties discharges the surety, even though the change is beneficial to the surety. *Whitcher v. Hall* (1826, K. B.) 5 B. & C. 269; *Driscoll v. Winters* (1898) 122 Calif. 65, 54 Pac. 387. But in a number of jurisdictions it has been held that, when it is self-evident without further inquiry that the change in the duties of the person for whom the surety became obligated is necessarily of benefit to the surety, he is not discharged. *Cambridge Bank v. Hyde* (1881) 131 Mass. 77; *Ullman Realty Co. v. Hollander* (1910, City Court N. Y.) 123 N. Y. Supp. 772; *Preston v. Huntingdon* (1887) 67 Mich. 139, 34 N. W. 279. Even under this rule, if the bond is construed not to permit such changes as ensued when Flindt became director it is submitted that it does not follow as a matter of law that such changes may not be prejudicial to the surety company.

TORTS—LIABILITY FOR INNOCENT MISREPRESENTATION.—The defendant's agent, to induce the plaintiff to purchase certain water rights, represented to him that a reservoir had a holding capacity three times as great as it actually had. In this action to recover damages resulting from the misrepresentation, the plaintiff's petition did not allege *scienter*. The lower court overruled the defendant's demurrer. *Held*, that the judgment should be affirmed, there being a breach of duty, although the defendant's agent did not know that his statement was false. *Becker v. McKinnie* (1920, Kan.) 186 Pac. 496.

The leading English case decided that an action of deceit could not be sustained unless the false representation was made "knowingly, or without belief in its truth, or recklessly, careless whether it be true or false," i. e., made with conscious dishonesty. See *Derry v. Peek* (1889, H. L.) 14 A. C. 337, 374. This case has apparently settled the law in England, although equity recognizes fraud without *mens rea*. *Nocton v. Ashburton* [1914, H. L.] A. C. 932; Anson, *Contract* (Corbin's ed., 1919) sec. 227. American rulings on the subject lack uniformity. Some courts follow *Derry v. Peek* in confining the action to cases where the defendant either knew his statement to be false, or was conscious that he did not know whether it was true or false. *Reno v. Bull* (1919) 226 N. Y. 546, 124 N. E. 144; *Peters v. Lohman* (1913) 171 Mo. App. 465, 156 S. W. 783. Others "presume knowledge," i. e., do not require *scienter*, if the defendant has peculiar means of knowledge. 12 R. C. L. 335. It has been suggested that an action on the case for negligence should lie, under limited circumstances, for misrepresentations made carelessly, though honestly; negligent words may cause as much damage as negligent acts. Jeremiah Smith, *Liability for Negligent Language* (1900) 14 HARV. L. REV. 184; *Cunningham v. Pease House Furnishing Co.* (1908) 74 N. H. 435, 69 Atl. 120. But there are objections to throwing the matter into the law of negligence. See Williston, *Liability for Honest Misrepresentation* (1911) 24 HARV. L. REV. 415, 436. It is submitted that justice is accomplished by those courts which, in a limited class of cases, support actions akin to deceit without requiring *scienter*. They

really allow recovery for negligence, which seems sound, and yet they avoid the difficulties of an action of negligence *eo nomine*. This would seem a just and conservative departure from the older conception of "deceit" as involving conscious dishonesty. The instant case seems clearly sound, and is in accord with previous Kansas decisions. *Bice v. Nelson* (1919) 105 Kan. 23, 180 Pac. 206.

TORTS—MALICIOUS PROSECUTION—CIVIL ACTION—ABSENCE OF INTERFERENCE WITH PERSON OR PROPERTY.—The defendant had harassed the plaintiff, by instituting civil suits against her and dismissing them on appearance of counsel, in the hopes of extorting money from her. There had been no seizure of her property or interference with her person. From a judgment in favor of the plaintiff in an action for malicious prosecution the defendant appealed. *Held,* that the action did not lie for merely beginning a civil action, unless property or person had been wrongfully seized or in some manner injuriously affected by process issued therein. *Pye v. Cardwell* (1920, Tex. Civ. App.) 224 S. W. 542.

There are two views concerning the essential elements of the tort of malicious prosecution of a civil action. According to the first, the cause of action is dependent upon the nature of the injury resulting from the commencement of the suit. Where there is a special injury to reputation, to property, or to person, a cause of action arises. *Luby v. Bennett* (1901) 111 Wis. 613, 87 N. W. 804; *Lawrence v. Hagerman* (1870) 56 Ill. 68; Chapin, *Torts* (1917) 477. Where there was no special injury, as in the instant case, no recovery is allowed. *Weber-Pleuthert Co. v. Leventhal* (1918, Sup. Ct.) 103 Misc. 80, 169 N. Y. Supp. 248. Some courts on this principle hold that the defendant has his action if he shows special damages over and above taxable costs. *Carbondale Investment Co. v. Burdick* (1903) 67 Kan. 329, 72 Pac. 781. By the other and preferable view one has no legal privilege to commence an action with malice and without probable cause. The act of commencing is the tort, the injury resulting being merely the measure of damages. *Kolka v. Jones* (1897) 6 N. D. 461, 71 N. W. 558; *Peerson v. Ashcraft Cotton Mills* (1918) 201 Ala. 348, 78 So. 204; see (1918) 16 MICH. L. REV. 653; (1918) 32 HARV. L. REV. 85. The action of malicious prosecution existed at common law. *Waterer v. Freeman* (1640) Hob. 205, 266; 1 Co. Lit 161a; see Lawson, *The Action for the Malicious Prosecution of a Civil Suit* (1882) 30 AM. L. REG. 281, 283. But the Statute of Marlbridge [52 Hen. III c. 6 (1267)] took away the necessity for it by allowing heavy costs to the defendant in actions brought *pro falso clamore*. Thereafter the action was denied unless some special injury was shown. *Saville v. Roberts* (1698, K. B.) 1 Ld. Raym. 374. American Courts following the English rule lack the fundamental reason for it, as costs awarded in American courts do not pretend to approximate the expenses of litigation. See *Kolka v. Jones* (1897) 6 N. D. 461, 466, 71 N. W. 558, 561. It is also said in support of the rule of the instant case that honest litigants will be deterred from coming into court and that the courts will be crowded with actions of malicious prosecution if a contrary policy should be adopted. Such, however, has not been the result. See *Peerson v. Ashcraft Cotton Mills, supra* (1918). Nor does much harm seem to have resulted from arming "fraudulent debtors with a right to recover damages through perjured testimony." The tendency now appears to be opposed to the principal case. *Teesdale v. Liebchwager* (1919, S. D.) 174 N. W. 620; see 26 Cyc. 15; L. R. A. 1918 D, 550, 555. It is suggested that a solution of the question lies in legislation granting costs and damages to a successful defendant when he could prove the suit was brought maliciously and without probable cause.